No. 15221

United States
COURT OF APPEALS
for the Ninth Circuit

JOHN FARLEY,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee,

UNITED STATES OF AMERICA,

Appellant,

vs.

JOHN FARLEY,

Appellee.

REPLY BRIEF OF APPELLANT, UNITED STATES OF AMERICA

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INTRODUCTORY

This brief constitutes the reply of appellant, United States of America, to the answer of appellee, John Farley, bearing on the question of jurisdiction of the Court in the absence of compliance with statutory conditions precedent to suit. Appellant's position on the merits has been fully stated in its opening brief.

THIRD SUPPLEMENTAL APPROPRIATION ACT OF 1951 REQUIRES ADMINISTRATIVE DISALLOWANCE

1951 Act Revived Claim Provisions of Clarification Act

In his answering brief, the libelant has contended that the Third Supplemental Appropriation Act of 1951, 65 Stat. 59, 46 U.S.C.A. 1241(a), "1951 Act," did not re-enact or revive the claim provisions of the Clarification Act, 57 Stat. 45, 50 U.S.C.A. App. 1291. Libelant argues that Congress only intended to revive certain limited provisions relating to benefits for government employees (Lib. Br. 8).

This argument completely ignores the plain language of the 1951 Act. Congress did not merely re-enact the former provisions relating to civil service, compensation and other similar matters. The statute clearly and unequivocally re-enacted and revived the claim provisions of the Clarification Act together with the other sections which are referred to in the statute.

How can it possibly be said that Congress did not intend to revive the claim provisions when the 1951 Act specifically refers to these provisions of the Clarification Act and states that they shall be applicable to seamen employed by the United States? Such a plain and unambiguous statute is certainly not subject to the interpretation placed on it by the libelant.

In support of his argument as to the intention of Congress, libelant has further stated "That the 1951

Supplemental Appropriations Act was not an express or implied reviver of the Clarification Act is thus shown by statutory history and careful analysis." (Lib. Br. 9). An examination of the statutory history of the 1951 Act indicates that the contrary is true.

The relevant portions of the 1951 Act which revived the Clarification Act are reported in 1953 AMC 1749. The report is entitled "W. S. A. Clarification Act, 1943—Revival of Various Provisions." It further states in a footnote on page 1750 that the revival covers, among other things, rights of merchant seaman with respect to death, injuries, maintenance and cure and it also refers to notice and administrative disallowance.

The Clarification Act is also reported in 50 U.S.C.A. App. 1291. The permanent bound portion of Title 50 merely contains the official citation and a brief description of the statute. On the other hand, the Cumulative Annual Pocket Part sets forth that portion of the Clarification Act which was revived by the 1951 Act.

More important, these revived provisions of the Clarification Act were fully considered and discussed in hearings before a subcommittee of Congress prior to the passage of the 1951 Act. See Hearings on HR 3587 before subcommittee of the House Committee on Appropriations, 82nd Cong., 1st Sess., March 21, 1951, pp. 194, et seq.

The purpose of the 1951 Act was clearly expressed by Admiral Cochrane during this hearing as follows:

> "MR. THOMAS. Is this language legislation, Admiral?

Admiral COCHRANE. The first proviso might be deemed to be legislation. It is intended, however, in the main, merely to remove any possible cloud upon the continued applicability of Public Law No. 17, Seventy-eighth Congress, to the operations of, and the seamen employed on vessels of, the Maritime Administration, which might be implied by a limitation contained in the Naval Appropriation Act, for fiscal year 1947, and continued in subsequent appropriation acts." (p. 195)

The above reference to the Naval Appropriation Act for the fiscal year 1947 is quite significant. This statute is Public Law 492, 79th Cong., 60 Stat. 481, which in part terminated the War Shipping Administration. This is the statute which is used as the basis for decisions such as *Burton v. United States,* 109 F. Supp. 139 (S.D. N.Y. 1952), which held that the requirement for administrative disallowance prevailed at the most for only two years after the termination of the War Shipping Administration.

In addition, the requirement of administrative disallowance was specifically discussed. The following occurred during the hearing:

"MR. THOMAS. Are there any other points involved there with reference to the seamen?

Admiral COCHRANE. One of the provisions in this is that any suits that may arise out of this would be enforced under the provisions of the Suits in Admiralty Act.

MR. THOMAS. Who would be the defendant in the case?

Admiral COCHRANE. These would be suits by the men themselves against the United States in cases of personal injury or something of that sort *where the claims were not settled administratively.*" (Emphasis added, p. 198)

The 1951 Act was passed at the beginning of the Korean War when the United States was again required to operate many merchant vessels. Congress obviously intended to restore the same practice and procedure which existed during World War II under the Clarification Act.

Libelant's argument that Congress did not intend to revive the claim provisions of the Clarification Act is not supported by the language of the statute, reason or statutory history.

Both of the parties to this appeal have previously referred to the revocation of General Order 32 by the Maritime Administration on December 21, 1953. The regulations were replaced by the Maritime Administration on April 7, 1955, pursuant to the stated authority contained in the Third Supplemental Appropriations Act of 1951. 20 Fed. Reg. 2414, 1955 AMC 1134.

Libelant contends that the revocation of General Order 32 destroys the entire basis for our objections to jurisdiction in this case. As we have previously stated, we do not believe that the revocation of General Order 32 could possibly have the effect of changing or revoking the requirements of the 1951 Act.

It is clear that statutory requirements cannot be suspended by administrative agencies. *Illinois Central Railroad Company v. Williams,* 242 U.S. 462 (1917). As stated in *United States v. Monarch Distributing Co.,* 116 F. (2d) 11 (CA 7, 1940), cert. denied 312 U.S. 695:

> "The point is made that appellee introduced no evidence to show there were any regulations concern-

ing the making of the entry. We are unable to see any merit to the point for the reason that the appellants were bound to keep the records prescribed by the statute and make the proper entries whether the Commissioner of Internal Revenue has prescribed any rules and regulations on the subject or not." (116 F. (2d) at 13)

The re-enacted Clarification Act provides that "Any claim . . . shall, *if administratively disallowed* in whole or in part, be enforced pursuant to the provisions of the Suits in Admiralty Act . . ." (Emphasis added). The statute does not establish a mere standard which requires regulation to become effective. The statute imposes a duty which is absolute and imperative prior to or in the absence of any regulations.

The 1951 Act itself requires administrative disallowance. In the absence of detailed regulations, the statute necessarily requires express disallowance or constructive disallowance by the expiration of either 60 days or a reasonable length of time.

Administrative Disallowance Is a Condition Precedent to Suits Against the United States

The libelant finally contends that if there is a requirement of administrative disallowance it is not a condition precedent to filing a libel but is only a temporary bar to its enforcement. He cites *Manderscheid v. United States,* 88 F. Supp. 232 (N.D. Cal. S.D. 1950), and further argues that it is not the practice in admiralty to dismiss a libel because it has been prematurely filed (Lib. Br. 12-15).

Libelant overlooks the fact that this is not a general admiralty proceeding between private litigants. This case involves the proper fulfilment of a statutory condition to bringing an action against the United States. *Danstrup v. The Richmond P. Hobson,* 112 F. Supp. 851 (E.D. N.Y. 1953).

The cases cited by libelant with respect to prematurity of filing do not involve cases under the Clarification Act and they are not analogous. There is a vast difference between the power to cure defective allegations and the power to correct a failure to comply with a statutory condition.

Manderscheid v. United States, supra, which is relied on by the libelant, apparently holds that administrative disallowance is only a temporary bar to the enforcement of a seaman's claim against the United States. As far as we have been able to determine, all of the federal authority is to the contrary.

Numerous cases have repeatedly held that the requirement of administrative disallowance is a condition precedent. An action cannot be commenced against the United States until a claim has been administratively disallowed. *Fox v. Alcoa SS Co.,* 143 F. (2d) 667 (CA 5, 1944), cert. denied 323 U.S. 788; *Rodinciuc v. United States,* 175 F. (2d) 479 (CA 3, 1949), cert. denied 338 U.S. 895; *Thurston v. United States,* 179 F. (2d) 514 (CA 9, 1950); *McMahon v. United States,* 186 F. (2d) 227 (CA 3, 1950), affirmed 342 U.S. 25 (1951); *Thomas v. United States,* 127 F. Supp. 48 (E.D. Pa. 1954).

The privilege of suing is given only after administrative disallowance of a written claim. *Fox v. Alcoa SS Co.*, 143 F. (2d) at 667. Until then a seaman is precluded from instituting suit upon his causes of action. *McMahon v. United States*, 186 F. (2d) 227, 230. Or, as stated by this Court in *Thurston v. United States*, supra:

> "It is apparent that the provision for the disallowance of claims before beginning suit makes the seaman's right under the Clarification Act quite different from his right if employed on a 'privately owned' vessel or under the Suits in Admiralty Act. Seamen in the latter two cases have the right to file their libels as soon as injured. Under the Clarification Act they must wait until their claims are filed and disallowed." (179 F. (2d) at 515)

The duty to obtain administrative disallowance is a condition precedent which must be alleged and proved. It is a statutory condition and not merely a temporary bar to the enforcement of a libel against the United States.

The libelant still has not indicated any reason or excuse for his failure to file a timely claim and to obtain administrative disallowance. The United States was not obligated to apply to the district court for an extension of time or for a stay of the proceedings when it clearly appeared that the case was not properly before the court. The libelant never acquired a cause of action and the court never acquired jurisdiction. The exceptions of the United States should have been immediately sustained.

CONCLUSION

When the United States of America granted its consent to be sued in accordance with the Suits in Admiralty Act, it imposed conditions precedent; namely, the presenting of a claim and the actual or administrative disallowance of the claim. Neither reason nor authority support the view that the trial court could obtain jurisdiction unless these conditions had been met. When appellee's counsel prepared and filed the libel on April 2, 1954, he obviously concurred in this view of the law for he alleged in paragraph II (Tr. 4):

> "That heretofore, on or about the 25th day of March, 1954, Libelant made and presented a claim as herein alleged to the United States of America, Respondent, and to the general agent, W. R. Chamberlin & Company, and that said claim has been neither accepted nor rejected to this date, and the same is deemed administratively disallowed."

The trial court should have sustained the exceptions of appellant, United States of America, to the jurisdiction and it is our considered opinion that appellant's exceptions to the jurisdiction should now be sustained.

Respectfully submitted,

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